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Permodalan Kedah Bhd v Che Ani bin Kamis

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02–669–03 OF 2012
ALIZATUL KHAIR, ROHANA YUSUF AND TENGKU MAIMUN JJCA
5 MAY 2014

Damages — Rules in awarding — Proof of damages — Whether trial court wrong to have granted general and exemplary damages without proof claimant suffered damages — Whether claimant's claim against company for unpaid salary increments unsustainable as employment contract showed annual increments were at management's discretion — Whether minutes of board of directors meetings showed no approvals were made to pay claimant salary increments

The respondent alleged that the appellant did not pay him salary increments for the years 2003–2006 when he was in its employment. In a suit against the appellant in the High Court, the respondent claimed, inter alia, for RM151,800 as the total annual increment due to him for those four years as well as for RM455,460 as general and exemplary damages. The respondent's RM151,800 claim was premised on the allegation that was the total amount the appellant had allocated in its annual budgets to pay for the respondent's annual increment. He alleged that from the time he was confirmed in employment, the appellant had never paid him annual increment until the year 2007. The record showed that the respondent had received salary increments and other perks whenever he was transferred to and back from the appellant's subsidiary company. The High Court allowed the RM151,800 claim and awarded RM10,000 as general and exemplary damages. In the instant appeal against the decision, the appellant said the High Court's decision was wrong (a) as neither the company's management committee nor its board of directors had approved annual increment payment for the respondent (b) to find the appellant had been negligent in not approving the respondent's annual increment when negligence was never a pleaded issue and (c) to allow the respondent's claim for the year 2003 when it was time barred under s 6(1)(a) of the Limitation Act 1953.

Held, allowing the appeal with costs of RM10,000:

(1) Under cl 2.2.1 of the terms and conditions of service, annual increment for all employees of the appellant was at the discretion of the management committee. There was ample evidence to show in the minutes of meetings of the board of directors ('BOD') that although there were discussions concerning annual increment, no approval was made by the BOD. In fact, in the minutes of the BOD meeting on

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10 December 2006, the BOD resolved to withdraw the consent granted by the chairman of the BOD in relation to the purported increment to the respondent on the ground the BOD had not approved the same. It was clear that without the management committee's approval, the respondent could not sustain a case of increment being due and owing to him. The fact that it was annually budgeted for did not ipso facto make it payable to the respondent (see paras 10–12).

(2) The High Court erred in making a finding of negligence on the part of the appellant when negligence was never the pleaded claim of the respondent. A judge must not decide upon a non-pleaded claim. It was also clear that the claim for increment for the year 2003 was barred by limitation as the suit was filed seven years after the alleged cause of action arose (see paras 13 & 15).

(3) The High Court did not state any reason for awarding RM10,000 for general and exemplary damages and the record did not show any evidence of damages suffered or proven by the respondent to justify that award. Under s 74 of the Contracts Act 1950, a party who suffered loss or damages which naturally arose in the usual course of things from a breach of contract was entitled to be compensated. The burden was on the respondent to prove damages. As the damages award was unsupported by evidence it was liable to be set aside (see para 16).

[Bahasa Malaysia summary

Responden mendakwa perayu tidak membayarnya kenaikan gaji bagi tahun 2003–2006 ketika ia masih bekerja. Dalam suatu guaman terhadap perayu di Mahkamah Tinggi, responden mendakwa, antara lain, untuk RM151,800 sebagai jumlah kenaikan gaji tahunan yang perlu dibayar kepadanya bagi empat tahun tersebut dan juga untuk RM455,460 sebagai ganti rugi am dan ganti rugi teladan. Tuntutan RM151,800 responden dibuat berdasarkan dakwaan bahawa itu adalah jumlah yang diperuntukkan oleh perayu dalam belanjawan tahunan untuk membayar kenaikan gaji tahunan responden. Dia mendakwa bahawa dari masa dia telah disahkan dalam jawatan, perayu tidak pernah membayar kepadanya kenaikan tahunan sehingga tahun 2007. Rekod itu menunjukkan bahawa responden telah menerima kenaikan gaji dan faedah lain apabila dia dipindahkan ke dan dari anak syarikat perayu. Mahkamah Tinggi membenarkan tuntutan RM151,800 yang mengawardkan dan RM10,000 sebagai ganti rugi am dan ganti rugi teladan. Dalam kes rayuan terhadap keputusan itu, perayu berkata keputusan Mahkamah Tinggi itu adalah salah (a) kerana bukan jawatankuasa pengurusan syarikat atau lembaga pengarahnya telah meluluskan pembayaran kenaikan gaji tahunan bagi responden (b) untuk mendapati perayu telah cuai dalam tidak meluluskan kenaikan gaji tahunan responden apabila kecuaian tidak pernah menjadi isu yang diplidkan (c) membenarkan tuntutan responden untuk tahun 2003 ketika dihalang oleh had masa di bawah s 6(1)(a) Akta Had Masa 1953.

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Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Di bawah klausa 2.2.1 terma-terma dan syarat-syarat perkhidmatan, kenaikan gaji tahunan untuk semua kakitangan perayu adalah mengikut budi bicara jawatankuasa pengurusan. Terdapat keterangan yang mencukupi untuk menunjukkan dalam minit mesyuarat lembaga pengarah ('BOD') bahawa walaupun terdapat perbincangan mengenai kenaikan gaji tahunan, tiada kelulusan telah dibuat oleh BOD. Malah, dalam minit mesyuarat BOD pada 10 Disember 2006, BOD yang memutuskan untuk menarik balik kebenaran yang diberikan oleh pengerusi BOD berhubung dengan kenaikan yang dikatakan kepada responden atas alasan BOD yang tidak meluluskan terhadap yang sama. Ia adalah jelas bahawa tanpa kelulusan jawatankuasa pengurusan, responden tidak dapat mengekalkan kes kenaikan gaji yang perlu dibayar dan terhutang kepadanya. Hakikat bahawa ia telah diperuntukkan bagi setiap tahun tidak ipso facto membuat ia perlu dibayar kepada responden (lihat perenggan 10–12).

(2) Mahkamah Tinggi terkhilaf dalam membuat sesuatu dapatan kecuaian di pihak perayu apabila kecuaian tidak pernah diplidkan oleh responden. Seorang hakim tidak boleh membuat keputusan atas tuntutan yang tidak diplidkan. Ia juga jelas bahawa tuntutan untuk kenaikan gaji bagi tahun 2003 telah dihalang oleh had masa kerana saman difailkan tujuh tahun selepas kausa tindakan yang dikatakan bermula (lihat perenggan 13 & 15).

(3) Mahkamah Tinggi tidak menyatakan apa-apa sebab untuk mengawardkan RM10,000 bagi ganti rugi am dan ganti rugi teladan dan rekod yang tidak menunjukkan apa-apa keterangan atau kerosakan yang dialami dibuktikan oleh responden untuk mewajarkan award itu. Di bawah s 74 Akta Kontrak 1950, pihak yang mengalami kerugian atau kerosakan yang terjadi secara semula jadi dalam perjalanan perkara biasa daripada pelanggaran kontrak berhak untuk diberi pampasan. Beban itu kepada responden untuk membuktikan kerosakan. Oleh kerana award kerosakan itu tidak disokong oleh keterangan ia adalah bertanggungjawab di sisi undang-undang untuk diketepikan (lihat perenggan 16).]

Notes

For a case on proof of damage, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) para 362.

Cases referred to

Great Eastern Life Assurance Co Ltd, The v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon) [2006] 2 MLJ 209; [2005] 4 CLJ 717, FC (refd)

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Kwong Yik Bank Bhd v Kwan Chew Holdings Sdn Bhd [2009] MLJU 632; [2011] 2 CLJ 269, CA (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239, SC (refd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)

Legislation referred to

Contracts Act 1950 s 74
Limitation Act 1953 s 6(1)(a)

Appeal from: Civil Suit No 22–297 of 2010 (High Court, Alor Setar)

Aisya Abdul Rahman (Azzat & Izzat) for the appellant.
Aswadi bin Hashim (Siti Rafidah with him) (Aswandi Hashim & Co) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] This appeal is against the decision of the High Court in Alor Star where the learned High Court judge allowed part of the claim by the plaintiff against the defendant. The claim of the plaintiff was in relation to salary increment allegedly owed by the defendant to the plaintiff in the course of the plaintiff's employment with the defendant. The defendant's counterclaim against the plaintiff premised on wrongful payment caused to be made to him for the increment for the year of 2007 was however dismissed by the learned judge.

[2] Aggrieved by that decision of the High Court, the defendant lodged this appeal. On 2 April 2013 we heard the appeal and by a unanimous decision we have allowed the appeal of the defendant. We set out below the reasons for our decision. We will refer to the parties as they were referred to at the High Court.

[3] For convenience, the brief history of the plaintiff's employment with the defendant is laid down in the following chronology:

2 June 1994	The plaintiff was offered the position of senior manager of planning and development in the defendant's company with a monthly salary of RM4,500 plus an entertainment allowance of RM500.
16 January 1995	He was confirmed in the position (wef) 1 January 1995 with his salary increased to RM6,500 plus an entertainment allowance of RM750.
1 January 1998	He was paid a housing allowance of RM750 per month.

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15 June 1995	He was transferred to the subsidiary of the defendant, Permodalan Kedah Bhd Capital Sdn Bhd ('PKBC') with the same remuneration.
9 February 2000	The board of directors of the defendant approved his salary increase to RM7,150.
12 January 2002	He was transferred back to the defendant's company as senior manager.
28 December 2006	He was transferred again to PKBC as general manager with his salary increased to RM7,865 plus entertainment allowance of RM750, housing allowance of RM750 and other perks including a car and mobile phone.

[4] The terms and conditions of the plaintiff's employment, including his annual increment and allowances were always subject to the terms and conditions of service of the defendant in exh P5.

[5] The thrust of the plaintiff's claim is for an annual increment allegedly due and owing to him for the year of 2003–2006. According to the plaintiff, a sum of RM151,800 was approved and allocated in the annual company budget of the defendant for the purpose of annual increment. The plaintiff alleged that ever since he was confirmed in his first year of service, the defendant failed to pay him any annual increment until the year 2007. The items of the plaintiff's claim are enumerated in para 12 of the statement of claim and they are as follows:

(a) RM151,800 in arrears of annual increment for the year of 2003–2006;

(b) RM21,255 being total outstanding salary according to the scale for general manager at PKBC and as approved by the PKBC Board of Directors;

(c) general and exemplary damages in the sum of RM455,460; and

(d) interest on damages (*ganti rugi faedah*) in the sum of RM100,000; and

(e) costs.

[6] At the High Court the claim of the plaintiff in item (a) above was allowed. The claim in item (b) was however dismissed. The learned High Court judge allowed a sum of RM10,000 as exemplary and general damages under item (c). The judgment sum was allowed with judgment interest as well as

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costs. The defendant's counterclaim for a sum of RM11,517.72 premised on wrongful payment made by the plaintiff to himself for the increment for the year 2007 was dismissed by the High Court.

[7] The learned judge allowed the claim of the plaintiff for the annual increment in item (a) on the basis that the plaintiff was allegedly excluded from being paid the annual increments which were approved and allocated for in the annual budget of the company. The claim allowed by the learned judge encompasses the increments for the year of 2003–2006.

[8] In resisting the plaintiff's claim on this item, the defendant advanced two main arguments. First, learned counsel for the defendant contended that the learned judge had fallen into error in allowing the claim because neither the management committee nor the board of directors ('BOD') had approved any annual increment to entitle the plaintiff for the same under cl 2.2.1 of the terms and conditions of service. The learned judge was said to have ignored the pleadings in his judgment when he found that the defendant was negligent in not approving the said annual increment. The defendant further contended that in allowing the year 2003 increment the learned judge had fallen into error for allowing a claim barred by limitation on the ground that the defendant did not plead limitation in its defence.

[9] From the above discussions we are of the view that this appeal can be easily disposed by determining only one main issue; that is whether the increment to the plaintiff is due and payable under the terms and conditions of service.

[10] We agree with the submission of learned counsel for the defendant that under the terms and conditions of service, the annual increment for all employees is at the discretion of the management committee. In this regard we note in particular that cl 2.2.1 is clear in its intent. Annual increment payable to the employee is at the discretion of the management committee.

[11] In fact learned counsel for the defendant agreed that neither the management committee nor the BOD had approved any of the increment claimed. Conversely there was ample evidence as shown in the various minutes of meeting of the BOD dated 18 February 2001, 16 April 2001, 25 August 2001, 5 September 2001, 3 December 2001, 29 May 2002 in exh D20, that there were discussions held on annual increment but no approval was made by the BOD. This can also be seen in the minutes of meetings of the BOD dated 2 March 2006, 20 July 2006 and 10 December 2006 in exh P6. What is more pertinent is the minutes of meeting of the BOD dated 10 December 2006. At para 4.3.1, the BOD resolved to withdraw the consent granted by the chairman of the BOD in relation to the purported increment to

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the plaintiff on the ground that there was no approval by the BOD on the same. In exh P6 again the issue of increment was debated and discussed but never met with approval of the BOD.

[12] It is plain and clear that without approval by the management committee, as the evidence revealed, the plaintiff cannot sustain a case of the increment being due and owing to him. In our view the fact that it was budgeted for in the annual budget does not, ipso facto, make it payable to the plaintiff. Furthermore we note that the history of the plaintiff's employment as enumerated in para 4 above reveals that the plaintiff's salary and perks did not exactly remain stagnant throughout his employment with the defendant.

[13] Learned counsel further contended, the finding by the learned judge that the defendant was negligent in not deciding on the issue of annual increment is an error, because it was never the pleaded case of the plaintiff. We agree with learned counsel for the defendant on the legal principle that a judge must not decide upon a non-pleaded claim. The Federal Court case of *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 clearly laid out this principle that it is not for the court to invent or create a cause of action which is not clearly pleaded in the first place (see *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239). The plaintiff's claim is for a non-payment of monies due and owing under the terms of employment and never on negligence. Clearly, we find the learned judge had fallen into error in making a finding of negligence and in allowing the plaintiff's claim on this ground.

[14] It is also the defendant's case that even if it can be argued that the increment claimed by the plaintiff is already due and payable, the increment for 2003 which was due in the year 2003 is barred by limitation. This action was filed seven years later in the year 2010. In his ground of judgment the learned judge allowed the claim of the plaintiff inclusive of the increment for the year 2003 on the ground that limitation was not pleaded by the defendant. We find para 5.1 of the amended defence dated 10 December 2010 raised the issue of limitation. In fact the plaintiff at para 5 of his reply dated 21 August 2011 also addressed the issue of limitation.

[15] The law is well settled that the limitation period for an action founded on breach of contract, as in the present appeal would be subject to s 6(1)(a) of the Limitation Act 1953. A cause of action founded on contract should run from the date of breach, (see *Kwong Yik Bank Bhd v Kwan Chew Holdings Sdn Bhd* [2009] MLJU 632; [2011] 2 CLJ 269 and *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209; [2005] 4 CLJ 717). A claim of increment for the year 2003 would not survive the statutory limitation of six

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years. The action was filed on 17 October 2010 which is seven years after the cause of action arose. The learned judge had fallen into error in allowing a claim which was barred by limitation.

[16] On item (c) the learned trial judge allowed a sum of RM10,000 as general and exemplary damages. The learned judge did not state any reason why this sum was allowed. Learned counsel for the defendant submitted that the learned judge had fallen into error in granting general and exemplary damages without supporting it with any reason or any evidence of damage suffered by the plaintiff. We have carefully perused through the appeal records and we do not find any evidence of damage suffered or proven by the plaintiff to justify the claim for damages. We would refer to s 74 of the Contracts Act 1950 to say that a party who suffered loss or damage which naturally arose in the usual course of things from a breach of a contract is entitled to be compensated. The burden to prove damage in the present case is therefore on the plaintiff. An award of damages unsupported by evidence is an error and liable to be set aside.

[17] In the final analysis, we find merits in the argument advanced by learned counsel for the defendant and we therefore allowed the appeal of the defendant with costs of RM10,000. We also ordered for the deposit to be refunded to the defendant.

Appeal allowed with costs of RM10,000.

Reported by Ashok Kumar